IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8263 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGUBHAI DAHYABHAI

Versus

HEIRS OF DECEASED CHHITALABHAISHANKARBHAI

Appearance:

MR RN SHAH for Petitioners

Mr R C Jani for respondents 1 & 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 23/02/2001

C A V JUDGMENT

The present petition has been filed by the petitioners above named, under Article 227 of the Constitution of India for appropriate writ, order or direction for quashing and setting the orders passed by the learned Mamlatdar as well as learned Appellate and

Revisional Authorities placed at Annexures A, B and C to the petition.

2. The facts of the case may be briefly stated as follows:

Deceased predecessors of respondents no.1 and 2 hereinabove preferred Tenancy Case No. 32/1/B/9953/83 before the learned Mamlatdar and Agricultural Land Tribunal at Chikli with a claim that they be treated to be tenants in respect of Property of 3 acres, paiki A. 2 of land of survey no.242.

3. In fact, the matter was referred to him by the learned Mamlatdar for the said purpose. The learned Mamlatdar & ALT in Chikli in Valsad district heard the parties and came to a decision that the predecessor of the present respondents no.1 and 2 were the tenants in respect of the said property. The learned Mamlatdar & ALT also found that they were in possession of the land in question on 15.6.1955. He also came to a finding that the possession of the said land with the present petitioners is contrary to section 29 of the Bombay Tenancy and Agricultural Land Act, 1958 (for short, 'the Act'). That therefore, the predecessor of the respondents no.1 & 2 are entitled to get possession thereof under section 32(1)(b) of the said Act. He, therefore, directed the Talati-cum-Mantri of the said Village Panchayat to take possession of the said land from the petitioners and to hand it over to the predecessor of respondents no.1 and 2.

4. Feeling aggrieved by the said judgment and order of the learned Mamlatdar & ALT dated 24.6.1985, the petitioners herein preferred Tenancy Appeal being Tenancy Appeal No.603/85. Same contentions were raised and after hearing the parties, the learned Dy.Collector found that there is no substance in the appeal and, therefore, he dismissed the appeal by judgment and order dated 18.8.1987. The petitioners felt aggrieved of the said judgment and order of the Dy.Collector and accordingly they preferred Revision Application being Revision Application No.TEN-B/S491/87. The learned tribunal again heard the parties and passed judgment on 31.7.1991 dismissing the said Revision Application of the petitioners herein and confirmed the orders of the Dy.Collector as well as the Mamlatdar & ALT. Feeling aggrieved by the said judgment and order of the tribunal, the petitioners have preferred this petition before this court.

5. It has been mainly contend here that the learned tribunal has not properly appreciated the provisions contained in Section 33(1)(b) of the said Act. It is further contended that the predecessor of respondents no.1 and 2 had voluntarily handed over possession of a part of the land in dispute, to the petitioners and, therefore, when the possession was voluntarily surrendered, there is no question of trying the case before the Agriculture Land Tribunal. That this aspect of the case has not been properly considered by the tribunal as well as the other two authorities under the said Act. That on the whole, the judgments and orders of the three authorities referred to hereinabove are illegal and erroneous and deserve to be set aside. It is, therefore, prayed that the present petition be allowed and the aforesaid three judgments and orders of the said three authorities be set aside.

6. On submission of the petition, Rule was issued and status-quo was ordered to be maintained. On service of notice of rule, Mr R C Jani, learned Advocate has appeared on behalf of respondents no.1 and 2. I have heard the learned Advocates for the parties and have perused the papers. The facts are not at all in dispute. Learned Mamlatdar as well as the learned Dy. Collector and the learned Gujarat Revenue Tribunal all have recorded concurrent finding of fact that the predecessor of respondents no.1 and 2 were in possession of the land in question at the relevant point of time. They have also recorded concurrent finding of fact that possession of the petitioner in respect of the land in question was against the provisions of law contained in section 29 of the said Act. Therefore, they came to the decision that the predecessor of respondents no.1 and 2 was entitled to claim tenancy rights in respect of the said land. They also found that the said respondents were entitled to claim possession of the land in question. Accordingly, the said three authorities have decided the matter against the present petitioners. These facts are not at all in dispute. The question which we are required to consider is as to whether the aforesaid decisions can be treated to be illegal ?

7. It has been vehemently contended at length by Mr R N Shah, learned Advocate for the petitioners that the petitioners were put in lawful possession of the land in question since the predecessor of the respondents had voluntarily surrendered the same and handed it over to the petitioners. That therefore, the petitioners were in lawful possession of the land in question. Therefore, there was no question of claiming tenancy right by

respondents no. 1 and 2 in the aforesaid land. That this aspect of the case has not at all been considered by the three authorities below. On the other hand, Mr R C Jani, learned Advocate for the contesting respondents no.1 and 2 has also argued at length that the matter has been properly dealt with by the three authorities below. That they have considered all the relevant provisions of law and have properly applied the same to the fact situation. That therefore, the orders of these three authorities are in accordance with law.

8. One thing is certain that the Mamlatdar has positively recorded a finding of fact that the possession of the petitioners in respect of the land in question is contrary to the provisions of section 29 of the said Act. This finding of fact has been confirmed by the Dy.Collector and the learned Gujarat Revenue Tribunal. Therefore, there are concurrent finding of facts recorded by the three authorities holding that the petitioners were in unlawful possession and the possession taken by them is contrary to section 29 of the said Act.

9. Mr R N Shah, learned Advocate for the petitioners has vehemently argued that the said authorities have not properly appreciated the effect of section 32(1)(B) of the Act. In support of the said argument, he has relied upon a decision of the Apex Court in the case of D T KADAM v. R B DUBAL [1995(1) GLR 344]. Pursuant to the observations of the Supreme Court, this decision goes to show that "the effect of surrender was that the appellant ceased to be a tenant. Dispossession should have therefore, been either by legal process or by physical act of exclusion. It would not include leaving possession voluntarily or by surrender. The appellant, therefore, did not satisfy the second requirement. Consequently, he did not become purchaser of the land under section 32(1-B) of the Act". On the strength of the said observations, Mr R N Shah, learned Advocate for the petitioners has argued that respondents no.1 and 2 had voluntarily surrendered possession of the land in question to the petitioner and, therefore, it was not open to the three authorities below to restore possession under the provisions by effecting possession of Section 32(1-B) of the Act.

10. Here, it has to be considered that the authorities below have not recorded finding of fact that respondents no.1 and 2 had voluntarily surrendered possession of the property in question to the petitioner. But they have recorded concurrent finding of fact that the petitioner was in unlawful possession of the said

land and contrary to provisions of section 29 of the act. These are the finding of fact which cannot be challenged and altered by the Court by exercising extraordinary constitutional jurisdiction under Article 226 of the Constitution of India. In the above view of the matter, when three authorities have recorded concurrent finding of fact, that the petitioner was in unlawful possession of the land in question and that he has deserved the possession contrary to the provisions of section 29 of the Act, it goes without saying that there was no voluntary surrender of possession by respondents no.1 and 2 in favour of the petitioners. In that view of the matter, the said decision will not cone to the rescue of the petitioner. On the other hand, even the learned Advocate for the contesting respondents no.1 and 2 has also relied upon the said decision while arguing that there is no voluntary surrender of possession, and, therefore, the provisions contained in Section 32(1-B) of the Act would clearly apply to the facts of the present case.

11. It has then been contended that the prayer has not been made within one year and, therefore, the learned Mamlatdar was not justified in directing restoration of possession. It seems that this issue does not appear to have been raised before the authorities below. Apart from the above position, respondents no.1 and 2 appear to be persons belonging to Scheduled Tribe. Some of them are women also. They appear to be illiterate persons coming from socially, educationally and economically backward class. Under that view of the matter, strict view of limitation cannot be rigidly applied. Even otherwise, this is a question of fact and had there been an issue before the three authorities below, the parties would have led proper evidence and the fact could be properly dealt with by the said three authorities. In that view of the matter, it would not be possible for this court to permit the petitioner to raise the aforesaid issue for the first time before this court. Same is the case with respect to application of estoppel, delay and latches. It would be seen that the matter has been referred to the Agricultural Land Tribunal by the Mamlatdar, who was directed to do so from his higher ups. Under the aforesaid set of facts and circumstances, it has to be considered that the issue of limitation is a mixed question of law and fact and it has to be dealt with in accordance with the facts and circumstances which may appear on record. In the present case, we find that the aforesaid issue does not appear to have been raised by the petitioner. This can be gathered from the judgment of the learned Revenue Tribunal. Any way, it is

apparently clear that there are concurrent finding of fact holding that respondents no.1 and 2 had not voluntarily surrendered possession. Therefore, they would be entitled to claim possession under Section 32(1-B) of the Act. The said finding cannot be treated to be illegal or perverse. It cannot also be treated to be against evidence. In that view of of the matter, the finding cannot be disturbed or quashed and set aside in this petition. That would clearly mean that there is no merit in this petition and hence is required to be dismissed. Under the circumstances, this petition is ordered to be dismissed. Rule discharged. The interim relief stands vacated. Considering the facts and circumstances, no order as to costs.

23.2.2001 [D P Buch, J.]
msp